

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

SL-9874

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UNITED STATES OF AMERICA,

Plaintiff,

- against -

Civil Action  
No. CV-05-0562

B.C.F. OIL REFINING INC.,  
CARY FIELDS, AND  
1.85 ACRES OF LAND, MORE OR LESS,  
LOCATED AT 360-362 MASPETH AVENUE,  
BROOKLYN, NEW YORK,

(Melancon, J.)  
(Pollak, M. J.)

Defendants.

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**CONSENT JUDGMENT**

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### **I. BACKGROUND**

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter on January 31, 2005 pursuant to Section 107(a) and 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9607(a) and 9607(l), as amended ("CERCLA"), seeking reimbursement of costs incurred by the United States for response actions at the B.C.F. Oil Refining Superfund Site located at 360-362 Maspeth Avenue, Brooklyn, New York (the "Site").

B. The complaint was filed against B.C.F. Oil Refining, Inc. ("B.C.F."), the Site property, and Cary Fields (the "Settling Defendant"). The claims of the United States with respect to B.C.F. and the Site property were resolved through a Stipulation and Order Determining Liability Against Defendant B.C.F. Oil Refining, Inc. entered by the Court on April 7, 2006 (Docket No. 29). The Court entered a final judgment in favor of the United States and against B.C.F. on August 15, 2007 (Docket No. 48).

C. The Settling Defendant does not admit any liability to the United States arising out of the transactions or occurrences alleged in the complaint.

D. Following the completion of discovery and dispositive motions, the United States and Settling Defendant (collectively, the "Parties") have negotiated this Consent Judgment to resolve the United States' claims against Settling Defendant.

E. The United States and Settling Defendant agree, and this Court by entering this Consent Judgment finds, that this Consent Judgment has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Judgment is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Consent Judgment, it is ORDERED, ADJUDGED AND DECREED:

### **II. JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. § 9607 and 9613(b) and also has personal jurisdiction over Settling Defendant. Solely for purposes of this Consent Judgment and the underlying complaint, Settling Defendant waives all objections and defenses they may have to jurisdiction of the Court or to venue in this District. Settling Defendant shall not challenge the terms of this Consent Judgment or this Court's jurisdiction to enter and enforce this Consent Judgment.

### **III. PARTIES BOUND**

2. This Consent Judgment is binding upon the United States and upon Settling Defendant and his heirs, successors and assigns. Any change in legal status, including but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendant under this Consent Judgment.

#### **IV. DEFINITIONS**

3. Unless otherwise expressly provided herein, terms used in this Consent Judgment which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Judgment or in any appendix attached hereto, the following definitions shall apply:

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

“Consent Judgment” shall mean this Consent Judgment.

“Day” shall mean a calendar day. In computing any period of time under this Consent Judgment, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

“DOJ” shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

“Effective Date” shall mean the effective date of this Consent Judgment as provided in Section XVI.

“EPA” shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

“EPA Hazardous Substance Superfund” shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

“Interest” shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

“Paragraph” shall mean a portion of this Consent Judgment identified by an Arabic numeral or an upper or lower case letter.

“Parties” shall mean the United States and Settling Defendant.

“Past Response Costs” shall mean all costs, including but not limited to direct and indirect costs, that the United States has paid or incurred at or in connection with the Site through the Effective Date of this Consent Judgment, plus accrued Interest on all such costs through such date.

“Plaintiff” shall mean the United States of America.

“Section” shall mean a portion of this Consent Judgment identified by a Roman numeral.

“Settling Defendant” shall mean Cary Fields.

"Site" shall mean B.C.F. Oil Refining Superfund Site located at 360-362 Maspeth Avenue, Brooklyn, New York, formally identified on Kings County tax map11 as Block 2917, Lot 110, and recorded in the Kings County's Clerk's Office at Liber 1052, Page 1663.

"Stipulation for Deposit of Funds" shall mean the Stipulation and Order with Defendant Cary Fields Depositing Settlement Funds with the Clerk of the Court, entered in this action on December 8, 2009 (Docket No. 114).

"United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

#### **V. PAYMENT OF RESPONSE COSTS**

4. Payment of Response Costs. The Settling Defendant shall pay to the United States the total sum of One Million Five Hundred Thousand Dollars (\$1,500,000), in payment for Past Response Costs and accrued Interest ("Settlement Amount").

5. The Settlement Amount has been deposited with the Clerk of the Court in an interest-bearing account pursuant to the Stipulation for Deposit of Funds. Pursuant to Paragraph 3 of the Stipulation for Deposit of Funds, the United States will present to the Clerk of the Court a copy of the "So Ordered" Consent Judgment. Pursuant to Paragraphs 3 and 5 of the Stipulation for Deposit of Funds, the Clerk of the Court will then pay all sums paid by Settling Defendant, plus interest and less a deduction for administrative costs associated with the Clerk's deposit and withdrawal of funds, to the U.S. Department of Justice, c/o the United States Attorney's Office. The total amount to be paid by Settling Defendant pursuant to Paragraph 4 shall be deposited by EPA in the EPA Hazardous Substance Superfund.

#### **VI. COVENANT NOT TO SUE BY UNITED STATES**

6. Covenant Not to Sue by United States. Except as specifically provided in Section VII (Reservation of Rights), the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant not to sue shall take effect upon receipt by EPA of the amount required by Section V (Reimbursement of Response Costs). This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendant of his obligations under this Consent Judgment. This covenant not to sue extends only to Settling Defendant and does not extend to any other person.

#### **VII. RESERVATION OF RIGHTS BY UNITED STATES**

7. The United States reserves, and this Consent Judgment is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within the covenant not to sue set forth in Paragraph 6. Notwithstanding any other provision of this Consent Judgment, the United States reserves all rights against Settling Defendant with respect to:

a. liability for failure of Settling Defendant to meet a requirement of this Consent Judgment;

- b. liability for costs to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

#### **VIII. COVENANT NOT TO SUE BY SETTLING DEFENDANT**

8. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees with respect to Past Response Costs or this Consent Judgment, including but not limited to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to Internal Revenue Code 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
- b. any claim arising out of response actions performed at the Site, including any claim under the United States Constitution, the Constitution of the State of New York, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and
- c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, RCRA Section 7002(a), 42 U.S.C. § 6972(a), or state law regarding Past Response Costs.

9. Nothing in this Consent Judgment shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

#### **IX. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

10. Nothing in this Consent Judgment shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Judgment. Each of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Consent Judgment diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

11. The Parties agree, and by entering this Consent Judgment, this Court finds, that this Consent Judgment constitutes a judicially-approved settlement for purposes of Section



113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Settling Defendant is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for "matters addressed" in this Consent Judgment. The "matters addressed" in this Consent Judgment are Past Response Costs.

12. Settling Defendant shall, with respect to any suit or claim for contribution brought by him for regarding the Site, notify EPA and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. Settling Defendant also shall, with respect to any suit or claim for contribution brought against him regarding the Site, notify EPA and DOJ in writing within ten days of service of the complaint or claim upon him. In addition, Settling Defendant shall notify EPA and DOJ within ten days of service or receipt of any Motion for Summary Judgment, and within ten days of receipt of any order from a court setting a case for trial, for matters regarding the Site.

13. In any subsequent administrative or judicial proceeding initiated by the United States with respect to any and all matters not specifically included within the Covenant Not to Sue by United States set forth in Section VI for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by United States set forth in Section VI.

#### **X. RETENTION OF RECORDS**

14. Until ten years after the Effective Date of this Consent Judgment, Settling Defendant shall preserve and retain all records now in his possession or control, or which come into his possession or control, that relate in any manner to response actions taken at the Site or the liability of any person under CERCLA with respect to the Site, regardless of any corporate or other document retention policy to the contrary.

15. At the conclusion of the document retention period in the preceding Paragraph, Settling Defendant shall notify EPA and DOJ at least 90 days prior to the destruction of any such records, and, upon request by EPA or DOJ, Settling Defendant shall deliver any such records to EPA. Settling Defendant may assert that certain documents, records, or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege in lieu of providing documents, it shall provide Plaintiff with the following: (a) the title of the record; (b) the date of the record; (c) the name, title, affiliation (e.g., company or firm), and address of the author of the record; (d) the name and title of each addressee and recipient; (e) a description of the contents of the record; and (f) the privilege or other protection asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendant shall retain all records that it claims to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Defendant's favor. However, no records created or generated pursuant to the requirements of this Consent Judgment or any other

settlement with EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

16. Settling Defendant hereby certifies that, to the best of his knowledge and belief, he has not altered, mutilated, discarded, destroyed, or otherwise disposed of any records, report, or information (other than identical copies) relating to his potential liability regarding the Site since the earlier of notification of potential liability by the United States or the State or the filing of suit against him regarding the Site, and that he has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6972.

#### **XI. NOTICES AND SUBMISSIONS**

17. Whenever, under the terms of this Consent Judgment, written notice is required to be given, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Judgment with respect to the United States, EPA, DOJ, and Settling Defendant, respectively.

##### **As to the United States:**

Sandra L. Levy  
Assistant U.S. Attorney  
U.S. Attorney's Office  
Eastern District of New York  
271 Cadman Plaza East  
Brooklyn, New York 11201  
USAO File No.2003V02852

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
DOJ File No. 90-11-2-1079

Brian E. Carr  
Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 17<sup>th</sup> Floor  
New York, NY 10007



As to Cary Fields:

Julian W. Friedman, Esq.  
Stillman, Friedman & Schechtman, PC  
425 Park Avenue  
New York, NY 10022

Cary Fields  
495 Broadway, 7<sup>th</sup> Floor  
New York, New York 10012

**XII. RETENTION OF JURISDICTION**

18. This Court shall retain jurisdiction over this matter for purposes of interpreting and enforcing the terms of this Consent Judgment.

**XIII. INTEGRATION**

19. This Consent Judgment constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Judgment. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Judgment.

**XIV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

20. This Consent Judgment shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with Section 122(d) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Judgment disclose facts or considerations which indicate that this Consent Judgment is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Judgment without further notice.

21. If for any reason this Court should decline to approve this Consent Judgment in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

**XV. EFFECTIVE DATE**

22. The effective date of this Consent Judgment shall be the date upon which this Consent Judgment is entered by the Court, or, if the Court instead issues an order approving the Consent Judgment, the date such order is recorded on the Court docket.

**XVI. SIGNATORIES/SERVICE**

23. The undersigned representatives of the United States and Settling Defendant each certify that he or she is fully authorized to enter into the terms and conditions of this Consent Judgment and to execute and legally bind such Party to this Consent Judgment.

24. Settling Defendant hereby agrees not to oppose entry of this Consent Judgment by this Court or to challenge any provision of this Consent Judgment unless the United States has notified Settling Defendant in writing that it no longer supports entry of the Consent Judgment.

25. Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by electronic mail on behalf of Settling Defendant with respect to all matters arising under or relating to this Consent Judgment. Settling Defendant agrees to accept service in that manner and to waive the formal service requirements set forth in Federal Rule of Civil Procedure 4 and any applicable local rules of this Court, including, but not limited to, service of a summons.

**XVII. FINAL JUDGMENT**

26. Upon approval and entry of this Consent Judgment by the Court, this Consent Judgment shall constitute a final judgment between the United States and the Settling Defendant under Fed. R. Civ. P. 58.

SO ORDERED this 16<sup>th</sup> day of September, 2010.



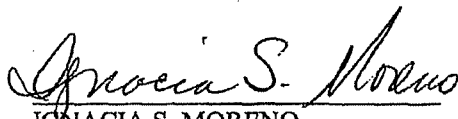
THE HONORABLE TUCKER L. MELANCON  
Visiting United States District Judge  
Eastern District of New York

THE UNDERSIGNED PARTY enters into this Consent Judgment in the matter of United States of America v. B.C.F. Oil Refining, Inc., et al., Civil Action No. CV-05-0562 (E.D.N.Y.):

FOR PLAINTIFF UNITED STATES OF AMERICA:

Date:

7/27/10



IGNACIA S. MORENO

Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

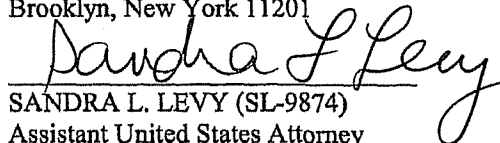
Date:

8/2/10

LORETTA E. LYNCH

United States Attorney  
Eastern District of New York  
271 Cadman Plaza East  
Brooklyn, New York 11201

By:



SANDRA L. LEVY (SL-9874)  
Assistant United States Attorney  
(718) 254-6014

THE UNDERSIGNED PARTY enters into this Consent Judgment in the matter of United States of America v. B.C.F. Oil Refining, Inc., et al., Civil Action No. CV-05-0562 (E.D.N.Y.):

Date: 7/8/10

  
WALTER MUGDAN

Director

Emergency and Remedial Response Division

U.S. Environmental Protection Agency, Region 2

THE UNDERSIGNED PARTY enters into this Consent Judgment in the matter of United States of America v. B.C.F. Oil Refining, Inc., et al., Civil Action No. CV-05-0562 (E.D.N.Y.):

FOR DEFENDANT CARY FIELDS:

Dated: New York, New York

June 23, 2010

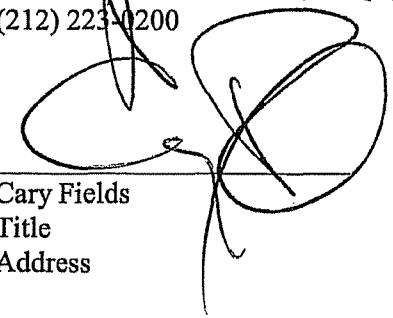
STILLMAN, FRIEDMAN & SCHECHTMAN, PC  
Attorneys for Defendant Fields  
425 Park Avenue  
New York, NY 10022

By:

  
JULIAN W. FRIEDMAN, ESQ. (JWF-6010)  
(212) 223-0200

Date: June 29, 2010

By:

  
Cary Fields  
Title  
Address

300 TIT -1 5 13 11